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No. 25

In the Supreme Court of the United States

October Term, 1962

CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF OF PETITIONER

CALVIN W. RAWLINGS
HAROLD E. WALLACE
BRIGHAM E. ROBERTS
WAYNE L. BLACK
JOHN L. BLACK
RICHARD C. DIBBLEE
Counsel for Petitioner
530 Judge Building
Salt Lake City, Utah

On Writ of Certiorari to the Supreme Court of Utah

Petition for Certiorari Filed October 18, 1962
Certiorari Granted January 7, 1963

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No. 535

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CLAUDE DENNIS, *Petitioner,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF OF PETITIONER

OPINION BELOW

The opinion below was filed in the Utah Supreme Court on May 29, 1962, Case No. 9543, and is reported at 13 Utah 2d 249, 372 P.2d 3.

JURISDICTION

Jurisdiction for writ of certiorari is sustained by 62 Stat. 929 (3), 28 U.S.C.A. §1257 (3).

STATUTES INVOLVED

The Statutes of the United States here applicable are 45 U.S.C.A., Section 51-60, commonly known as

the Federal Employers' Liability Act. See 35 Stat. 65, as amended by 36 Stat. 291 and 53 Stat. 1404. Sections 51,53, and 54 are set forth in Appendix A.

QUESTIONS PRESENTED FOR REVIEW

The Supreme Court of Utah set aside a jury verdict for petitioner in a case filed by a railroad employee under the Federal Employers' Liability Act. The question presented for review is whether that holding is in conflict with controlling decisions of the United States Supreme Court. It is petitioner's position that the Utah Court improperly held as a matter of law:

(a) That respondent was not negligent in overexposing petitioner to freezing weather.

(b) That petitioner's own conduct was the sole proximate cause of his injuries; and

(c) That petitioner assumed all risks incident to his employment.

The decision of the Utah Court is in conflict with *Anderson v. Atchison, T. & S.F.R. Co.*, 333 U.S. 821, 68 S.Ct. 854, 92 L.Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Blair v. Baltimore & O.R.Co.*, 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945); *Boston & Maine Railroad v. Meech*, 156 F.2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U.S. 763, 67 S.Ct. 124, 91 L.Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P.2d 963, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L.Ed.2d 366 (1960); *Ellis*

v. Union Pacific R. Co., 146 Neb. 397, 19 N.W.2d 641, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct.457, 1 L.Ed.2d 511 (1957); *Harris v. Pennsylvania R.Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P.2d 501, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261 (1947); *Ringhiser v. Chesapeake & Ohio R. Co.*, 354 U.S. 901, 77 S.Ct. 1093, 1 L.Ed.2d 1268 (1957); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957); *Tennant v. Peoria & P.U.R.Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Tiller v. Atlantic Coast Line R.Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) *Webb v. Illinois Central R.Co.*, 352 U.S. 512, 77 S.Ct 451, 1 L.Ed.2d 503 (1957); *Wilkerson v. McCarthy*, 112 Utah 300, 187 P.2d 188, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1947).

Some of the language from the above cases is particularly applicable here. In *Lavender v. Kurn*, supra, this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference

or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P.U.R.Co.*, supra, this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court, which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

And in *Rogers v. Missouri Pacific R. Co.*, supra, this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part at all* in the injury or death." (Italics ours.)

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie v. Thompson*, supra, (unprotected telegraph operator criminally assaulted); *Urie v. Thompson*, supra, (exposure to silica dust); *Anderson v. Atchison, T.& S.F. R.Co.*, supra, (exposure to weather).

Since filing of the Petition for Writ of Certiorari, the Second Circuit Court of Appeals decided the case of *Thomas Hayes v. New York Central R.Co.*, 311 F.2d 198, (Dec. 18, 1962). In the Hayes case the court affirmed a verdict under the FELA for a casual employee who worked over a twenty-seven-hour period shoveling snow from switches in defendant's railroad yard and who suffered injury from frostbite. During said twenty-seven hours plaintiff was given four breaks of forty-five minutes to an hour each for eating and coffee. The temperature ranged from six to twenty-two degrees Fahrenheit, with high winds. The court held that the railroad had an affirmative duty of exercising ordinary care in safeguarding its employees from inclement weather.

STATEMENT OF THE CASE

Petitioner, a fifty-five-year-old section hand, filed this action to recover damages for injuries sustained by him in the course of his employment on the night of January 2-3, 1960, near Green River, Utah. He claimed that respondent negligently required him to work an overtime, hastily planned shift of twelve hours on a windswept night in zero temperature, without ade-

quate warming facilities, in order to perform a routine repair of an open joint; and that as a result he suffered frostbite, necessitating amputation of two fingers on his left hand. (R. 1-3.) The evidence supported his claim.

The track maintenance crew, of which petitioner was a member, was called on Saturday evening, January 2, 1960, to repair an open joint on the mainline track, approximately sixteen miles west of Green River. The crew consisted of the foreman, a truck driver, and two laborers, one of whom was petitioner. (R. 24,25,) Another crew member, Delmar H. Powell, could not be located. (R.24,100,101.) A track maintenance crew worked out of Cedar, Utah, but was apparently working elsewhere. The open joint was slightly in the Cedar crew's territory. (R. 22,23,26.)

A joint is the convergence point of two lengths of rail. Joints are fastened together by angle bars, bolts, and nuts on each side of the rails. An open joint is caused by the contracting of rails in extremely cold weather to the point where the bolts on one side of a joint are sheared, thus causing an undesired separation. (R. 26,28.29) The rails at the open joint in question were approximately one and three fourths of an inch apart. (R.29.) Petitioner did not classify repair of an open joint as an emergency. (R. 23,49,69.) He testified that by use of a "dutchman" this particular work could safely have been postponed until morning. (R. 43-45, 60,61.)

The repair of an open joint is accomplished by loosening the nuts on the bolts at each joint, continuing

from the open joint for approximately nine joints in each direction. (R.33.) The rails are thirty-nine feet in length. (R. 26.) After the nuts are loosened, a chisel is used to pry the rails at the open joint close enough together so that new bolts and nuts can be used at the place where the old ones have been broken. (R.33-35.) A wrench approximately four feet in length is used to loosen the nuts.

The crew met at the toolhouse near the Green River depot at approximately 5:00 p. m. The weather was "awful cold," (R. 25.) the weather report indicating a temperature of ten degrees Fahrenheit, growing colder during the night to five degrees below zero Fahrenheit, at 5:00 a. m. (Pl.Ex. 3-P; R. 76,138.) Petitioner wore heavy underwear, levi-type waist overalls, heavy shirt, heavy jacket, sheepskin coat, heavy socks, work shoes, and two pair of gloves, inner canvas gloves with flannel material on the inside, and outer rubberized canvas gloves. (R. 25, 72,73.) Petitioner was the only crew member not wearing overshoes. (R. 25,55,85,101.)

Dr. Reed Clegg testified that when a person's body temperature is reduced, his extremities are more subject to frostbite. Therefore, a person having cold feet is more subject to frostbite of his hands. (R. 76.)

Foreman Chronopoulos testified:

> "Q. *Now you say that you noticed that when Mr. Dennis came out to report for the job, you thought that he wasn't dressed warmly enough, is that correct?*
>
> "A. *That's correct.*" (R. 108.)

The crew was taken by truck to milepost 571, where it was met by signal maintainer Wernz. They proceeded by motorcar approximately three fourths of a mile to where the open joint was located. Wernz left. The crew then inserted a "dutchman." A "dutchman" is a small piece of rail which can be inserted at an open joint by removing the angle bars, inserting the "dutchman," replacing the angle bars, and tightening the nuts and bolts on one side of the joint. With a "dutchman" thusly inserted trains can be slowed down and moved across a joint at from fifteen to twenty miles per hour. (R. 29,30,43,67.)

As soon as the "dutchman" was inserted, the foreman sent petitioner for the truck, *which necessitated walking approximately three hundred yards through eight to ten inches of snow.* (R. 31,33.)

After the truck was driven to the site, a tie was removed and used in making a fire. The fire was ineffective because of the severe wind which was blowing from the west through the cut in which the open joint was located. (R. 31,33.)

At first the four men worked in pairs, with one pair proceeding west and one east from the open joint. One man would hold a lamp, and the other would work with the wrench. (R. 112-114.) Later the four men worked together on one side, with two or three men working and the foreman supervising. (R. 34-36.) The truck driver moved the truck at intervals, using the truck lights to assist with the work. (R. 113.)

Petitioner testified that he was cold and that using the metal tools contributed to the coldness of his hands.

(R. 34,35.) He had never before worked at nighttime in weather that cold. (R. 23,51,53.)

The foreman supervised the crew throughout the night. He testified as follows:

> "Q. Mr. Chronopoulos, you have been the Section Foreman in that Green River area for several years, have you?
>
> "A. I have.
>
> "Q. But as a Section Foreman, you are the person who is in charge out there, are you not?
>
> "A. I am.
>
> "Q. And you make the decisions, do you?
>
> "A. I do.
>
> "Q. And you tell the men what to do, when to do it and how to do it?
>
> "A. That's right." (R. 108.)

Under the supervision of the foreman the men took regular turns at the fire. Petitioner testified:

> "A. We would alternate to go to the fire unless a train was going by and then we was all over there at the same time." (R. 68.)

A train was waiting at the open joint when the crew arrived. As soon as the "dutchman" was installed, it proceeded on its way. Two additional trains passed along the track during the night. (R. 66,102.)

At approximately midnight, while at the fire, petitioner had to pry the fingers of his left hand from the wrench and so advised the foreman. (R. 35,36.)

> "Q. All right, now tell us what happened?
>
> "A. I went to the fire—all of us went to the fire

while the train was going by and I laid the wrench down there and when I did these two fingers were clamped shut and I had to pull them apart like that before I could get my glove off.

"Q. All right now, you are pointing to fingers on your right hand?

"A. Yes, I mean to this hand of course.

"Q. Those were fingers on your left hand?

"A. Yes, the little finger and the ring finger.

"Q. All right, what feeling or sensation did you notice in [fol. 109] the fingers at that time?

"A. Well, it started to burning more or less like your hand has been asleep and waking up or your foot; kind of burning, tingling sensation.

"Q. Was there any other feeling that you noticed?

"A. Well, not at that time.

"Q. All right now, did you say anything about this to anyone?

"A. Yes, I mentioned it to —

"Q. Who to?

"A. They were — well, they were all right there at the fire,

"Q. *Was the foreman there too?*

"A. *Foreman and the other two men.*

"Q. *What did you say?*

"A. *I said, 'it looks like my hana s frozen to that wrench.'*

"Q. *All right now, after that was the work continued?*

"A. *Yes.*

"Q. *And did the foreman, Mr. Chronopoulos, did he continue to supervise this work?*

"A. *Yes, he was there all the time.*" (R. 35, 36.)

The foreman admitted that Dennis complained of the cold.

"Q. Now during this particular night, Mr. Chronopoulos, did Mr. Dennis complain to you about the cold?

"A. He did.

"Q. About what time was that?

"A. Well, I would judge about around midnight." (R. 104.)

Later in the evening the batteries on the lights grew weak, and the lights on the truck were used to help light the area. Petitioner went to the truck at the end of the shift for the purpose of turning the truck around. This took "not over thirty minutes altogether." (R. 64.)

The work was finished at approximately 4:00 a.m. The crew returned in the truck to Green River, arriving at approximately 5:00 a.m., making a total working time of twelve hours, with no coffee or lunch breaks and no rest period. (R. 37.) A regular shift is eight hours. (R. 23.)

As heretofore indicated, repair of the open joint was not an emergency and use of the "dutchman," a flagman, and issuance of special slow-down train orders would have made it practical to have delayed the work until morning. (R. 43-46,60,61.) Petitioner testified that by working in daylight the open joint could have

been repaired in four hours. (R.45.) He also testified that by utilizing an extra crew and working by daylight the work could have been completed in two hours. An additional crew working at night would have shortened the task to four hours. (R. 45.)

After arriving home, petitioner noticed tingling, burning, and discoloration of his left hand. He went to see the doctor that same morning and received medication. Later he was hospitalized and underwent amputation of the little and ring fingers of his left hand. (R.38-41.)

The jury returned a verdict in the gross amount of $20,000.00 reduced to $10,000.00 for contributory negligence. (R.7.)

The Supreme Court of Utah rendered its opinion on May 29, 1962, vacating petitioner's judgment. Thereafter petitioner filed a petition for rehearing which was denied on August 7, 1962. In the meantime, the Utah Supreme Court corrected the original opinion by deleting several factual errors which had been called to its attention by petitioner. See Appendices A and B of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The decision of the Utah Supreme Court setting aside the verdict in favor of petitioner is based on the following prejudicial and reversible errors:

1. The Supreme Court of Utah improperly held as a matter of law that respondent was not negligent in overexposing petitioner to freezing weather.

The impropriety of the Utah court's decision becomes manifest in the light of the following facts:

(a) When the crew first met at Green River, the foreman was of the opinion that petitioner was inadequately dressed and yet allowed him to proceed with the crew to the all-night task of repairing the open joint.

(b) The foreman worked his crew steadily for twelve hours in nighttime, zero, windswept weather, without a single break for coffee, lunch, or rest.

(c) Petitioner complained of his fingers being frozen to the wrench at midnight, and the foreman did nothing to afford him protection from a known danger, nor did he relieve him from his assignment in repairing the joint.

(d) The danger of injury from overexposure could easily have been eliminated.

2. The Supreme Court of Utah improperly held as a matter of law that petitioner's negligence "with regard to his clothing and/or in caring for his own person in the cold" was the sole proximate cause of his injuries.

The evidence is that both petitioner and the foreman were exposed to the same weather conditions. They were equally capable of drawing logical conclusions as to the likelihood of injury from exposure. In addition, the foreman was in charge of the crew. He alone could furnish petitioner transportation sixteen miles to the safe refuge which the Utah court apparently felt petitioner should have sought. He formed the opinion that petitioner was not warmly enough dressed before the

crew left Green River, yet he sent petitioner through three hundred yards of snow without overshoes. *He was advised at midnight that petitioner's fingers were frozen to the wrench; and he kept petitioner in the cold working on the joint for an additional three and one-half hours.* In the face of the foregoing facts, the Utah court placed sole blame on petitioner for his "error in judgment" in not "caring for his own person in the cold."

3. The Supreme Court of Utah improperly resurrected the doctrine of assumption of risk as a bar to petitioner's right of recovery.

The Utah Supreme Court has held that petitioner's conduct "in caring for his own person" was the sole cause of his injury. This holding approves and supports the attitude of Foreman Chronopoulos, when he testified that he *knew* petitioner was inadequately clothed but took no measures to protect him from over-exposure, because "the railroad has no responsibility" and "it isn't my responsibility either . . ." (R. 108.) The decision of the Utah court, regardless of the label, is nothing more nor less than another attempt to revive assumption of risk as a defense. The *Tiller* case, supra, is contrary to the Utah decision and necessitates its reversal.

ARGUMENT

POINT I

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW

THAT RESPONDENT WAS NOT NEGLIGENT IN OVEREXPOSING PETITIONER TO FREEZING WEATHER.

In determining whether the evidence presented a jury question on the issue of negligence "we must assume the most favorable statement of plaintiff's case to be true." See Mr. Justice Holmes per *Texas & Pacific R.Co., v. Behymer*, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905 (1903). And ". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury." See *Ellis v. Union Pacific R. Co.*, supra.

Factual Basis for Jury Finding of Negligence

The evidence was that when the crew first met at Green River, the foreman formed the opinion that Dennis was not dressed warmly enough for the anticipated night's work. However, he argumentatively testified that he had no responsibility with regard to supervision of the attire of his men. (R. 108.) The foreman thereafter proceeded with petitioner and the other members of the crew to the open joint sixteen miles from Green River and kept them at work throughout the night, subjecting them to temperature hovering near zero, on a windswept plain, without a single break for coffee, lunch, or rest over a period of twelve hours. Shortly after arriving at the open joint the foreman selected petitioner to walk a distance of three hundred yards in ten-inch snow at a time when he knew petitioner was the only member of the crew not wearing overshoes. At midnight, when the men were hovering near the fire, while a train was passing, petitioner notified the foreman that his fingers were

frozen to the wrench. Knowing that petitioner was in the process of suffering injury from overexposure, the foreman nevertheless failed and neglected to relieve him from his assignment in repairing the joint; on the contrary, he kept petitioner at work in the cold for an additional three and one-half hours. At the conclusion of the work, the foreman required petitioner to ride in the cold back end of the truck on the return trip to Green River.

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, *the fact that the car could have been opened or unloaded near the bridge on level ground* — all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent." (Italics ours.)

In view of the foregoing language of the *Bailey* case, it may not be amiss to consider additional safeguards that could have been taken to protect petitioner from injury.

1. At Green River, before the crew left for work, the foreman could have sent petitioner back for more clothing, in view of his belief that petitioner was inadequately clothed.

2. In view of the fact that petitioner was the only crew member not wearing overshoes, the foreman could

have sent another man the three hundred yards through the snow to get the truck.

3. At midnight, when the foreman was advised that petitioner's fingers were frozen to the wrench, he could have sent petitioner to a place of warmth and safety rather than keeping him at work in the cold for an additional three and one-half hours.

4. An additional crew could have been furnished either to work with petitioner's crew or to relieve it at the midway point. This would have eliminated for all practical purposes the danger of overexposure.

5. The task could have been postponed until morning by using the "dutchman" and flagmen. This would have eliminated for all practical purposes the danger of overexposure.

6. The crew could have worked a short evening shift and come back the next morning to finish the task.

7. The foreman could have taken the crew to Green River after having worked five or six hours and spent an hour warming and having coffee and then returned to finish the task.

In the face of the foregoing evidentiary basis for the jury's verdict, the Utah court has held that this is one of those:

> "... infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." See *Rogers v. Missouri Pacific R. Co.*, supra.

Inappropriate Resolution of Facts by Utah Supreme Court

The Utah Supreme Court has deprived petitioner of a jury trial by the inappropriate resolution of conflicting evidence. We cite a number of specific instances.

1. In its opinion the Utah Court states: (372 P.2d at p. 5.)

> "However, in searching for fault on the part of the railroad, it is significant to observe that there is no evidence that any one prevented or dissuaded the plantiff from warming his hands as often or as long as he wanted to";

And again: (P. 6)

> "He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to."

The Utah court fails to take into consideration the fact that *the foreman was in continuous supervision of the crew throughout the night, and the procedure adopted under his supervision was for the men to take turns at the fire.* The Utah court adopted as fact an inference that petitioner could have taken someone else's turn at the fire in addition to his own without objection from the foreman. The correct inference in petitioner's favor is that as a common laborer, working under the direction of a foreman, and knowing that they weren't going to quit until repair of the open joint was completed, petitioner would not feel that he had the pleasant alternative of being a slacker while his fellow workmen were laboring in the cold. There is no evidence that the foreman was such a generous fellow. In addition, petitioner, as a conscientious workman, would feel it his

duty to stay out and do his share of the work. That was expected of him and the thing for which he was paid.

2. The Utah court states: (p. 6)

> "With all sympathy for the plaintiff's misfortune, and every indulgence toward his claims, we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it."

Petitioner has never undertaken to blame respondent for the cold weather. The basis for petitioner's claim, which the Utah court failed to perceive, is that respondent negligently exposed him to the cold weather for an unreasonable length of time. The repair of the open joint was not an emergency. The foreman could have delayed the work until morning. However, he chose to keep the crew at work until the repair had been completed. This brings into consideration the question of time. In view of the zero weather, the wind, and the darkness, what would be a reasonable cutoff time? Suppose this crew couldn't have finished the job in less than twenty hours. Would the Utah court hold as a matter of law that twenty hours of exposure was reasonable? Here petitioner was exposed to adverse weather conditions for twelve hours. A normal shift under ordinary conditions is eight hours. (R. 23.) Should a state appellate court decide what is a reasonable cutoff time as a matter of law, or should this matter be resolved by a jury in the spirit of liberality typified by the *Bailey* case, supra?

3. The Utah Supreme Court stated: (p. 7)

> "It must be appreciated that the railroad is in a business which literally moves on and must be kept moving."

And again: (p. 7)

> "In the face of difficulties such as here arose, it must resort to the best expedient available to meet these responsibilities and to keep its trains running on schedule."

Who should determine what is the "best expedient available"? As we have pointed out, the jury was not obliged to find it was necessary *or even particularly important* that "in order to keep the railroad moving," petitioner's crew be kept at work for twelve uninterrupted hours. As a matter of fact, the testimony was that by use of the "dutchman" trains could have been, as they were, kept moving regardless of whether the repair was made that night or the next morning. This is another example of an argumentative fact-finding appraisal of the evidence rather than a determination of whether there was an "evidentiary basis" for a finding in petitioner's favor.

4. The Utah court states: (p. 7)

> "They claim reasonable care required these measures: (1) That the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the 'dutchman' (a short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold.
>
> In so far as the record reveals, these claims are fashioned of nothing more substantial than con-

> jecture and there is no reasonable basis to hold the railroad negligent on either count."

And again: (p. 7)

> "Nor is it shown that additional men would have shortened the time required for the repair."

The fact is, petitioner testified that an additional crew working at night could have repaired the open joint in four hours; that a single crew working in daylight could have performed the repair in four hours; and that with an additional crew working in daylight, they could have completed the work in two hours. (R. 44, 45.)

Petitioner's opinion was based on sixteen years' experience as a section hand. Furthermore, he is supported by the facts. The evidence was that in the early evening the four men paired off, each pair working simultaneously, step by step, away from the open joint. One man would hold the light and the other man work with the wrench. Later the crew started to work on one joint at a time. The truck driver would move the truck as the work progressed in order to help with the lighting. Also, the men were taking turns at the fire. An additional crew would have made it possible for the men to work throughout the night on two or more joints at a time. (R. 93.) Additional men would have been available to hold the lights, and the men would have been able to spend more time at the fire. (R. 34-37, 112-114.) If the work had been done in daylight, it wouldn't have been necessary for men to hold the lights; and with additional men available to work on the joints, the work time would have been shortened.

The Utah court, however, found as a fact that addi-

tional men wouldn't have shortened the work time *at all*, and that petitioner's claim to the contrary is based on "nothing more substantial than conjecture."

"5. In the *original* opinion the Utah Supreme Court stated: (See Appendix B, Pet. for Cert., p. 12.)

> "He said that at sometime during the night he complained of being cold, and the foreman told him to get in the truck."

And again: (p. 16)

> "It is undisputed that the only time he mentioned being cold the foreman suggested that he go to the truck for that purpose and he did so."

The foregoing statements were deleted from the corrected opinion, because petitioner had denied their truth under oath. (R. 64.) For the purpose of this brief, the foreman at no time suggested that petitioner get into the truck. *But it is interesting to note that when the decision was made to defeat petitioner, said misapprehension existed in the mind of the Utah court.*

At midnight when petitioner advised the foreman that his fingers were frozen to the wrench, the foreman should have done what the Utah court originally thought he did do. He should have suggested, or better still, insisted that petitioner go to the truck. The jury has so found.

6. In both of its opinions, the Utah court persists with the statement that the foreman and both other men testified that petitioner "went to the truck about midnight and remained there the rest of the night until the repair was completed about 4:00 a.m."

The foregoing statement is not supported by the record. The foreman testified petitioner was in the truck two hours. (R. 104.) Lee Carbjal testified petitioner was in the truck two hours. (R. 90.) James Burnett never did testify as to how long petitioner was in the truck. But the two hours supported by respondent's witnesses cannot be taken as true. Petitioner testified:

> "*Q. How long would you say you were in the truck?*
>
> "*A. Not over thirty minutes altogether, turning it around and altogether.*" (R.64)

Misconceptions of Law

In addition to its overriding misconception of the law concerning the right of trial by jury, the Utah court has made a number of erroneous statements as to the status of the law. We cite only a few.

1. In addressing itself to petitioner's evidence as to what more could have been done to protect the crew from overexposure the Utah court stated: (p. 7)

> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

With regard to the conjecture argument this court stated in *Lavender v. Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them

to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*" (Italics ours.)

2. The Utah court states: (p. 6.)

> "However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands."

The Utah court is incorrect in making the foregoing statement. The following cases impose the duty on railroads of exercising ordinary care in supervising the attire of employees: *Ferrara v. Boston & Maine Railroad*, 338 Mass. 323, 155 N.E.2d 416 (1959) (failure to furnish employee with helmet while welding). *Fitzpatrick v. St. Louis-San Francisco R. Co.*, Mo., 327 S.W.2d 801 (1959) (failure to furnish goggles; loss of eye because of dust). *Spears v. Atchison, T. & S.F. R. Co.*, 255 F.2d 780 (7th Cir. 1958) (failure to furnish rubber boots to protect feet from diesel and fuel oils). *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951) (failure to furnish lifesaving equipment where working on washout). *Young v. Clinchfield R. Co.*, 288 F.2d 499 (4th Cir. 1961) (failure to furnish respirator to employee working behind cribbing machine).

3. The Utah court apparently is of the opinion that if an additional crew was not available, the railroad is absolved from responsibility. The court states: (p. 7)

> "Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available."

This is a novel defense against the claim of insufficient help, but it has no legal support. The following cases support findings of negligence for failure to provide sufficient help, and hold that the duty of providing sufficient help is nondelegable. *They do not impose on an injured workman the duty of proving that other workmen were standing in the wings waiting to be called into the game.* See *Blair v. Baltimore & O. R. Co.*, supra; *Bourquet v. Atchison, T. & S.F. R. Co.*, 65 N.M. 207, 334 P.2d 1112 (1959); *Davis v. Virginian R. Co.*, supra; *Southern Railway Co. v. Welch*, 247 F.2d 340 (6th Cir. 1957); *St. Louis-San Francisco R. Co. v. King*, Okla., 368 P.2d 585 (1961).

4. Petitioner cited the *Rogers* case, supra, to the Utah court and was met with the following statement: (p. 6)

> "Plaintiff also urges application to our case of certain language from *Rogers v. Missouri Pacific Railroad Company:*
>
> "' . . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . .' (Emphasis added.)
>
> *"We do not understand the emphasized phrase, upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist.* It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever pro-

> portion of the damages it caused. But it does not suggest any the less necessity for finding negligence, nor that 'even the slightest' fault might be found to be negligence." (Italics ours.)

The Utah court states that the liberal test pronounced in the *Rogers* case applies to the causation issue but not to the issue of negligence. A peremptory reading of the leading cases on the issue of negligence, as well as on the issue of proximate cause, demonstrates that there is no such nice distinction in quantum of proof between negligence and causation. See *Wilkerson v. McCarthy*, supra; *Lavender v. Kurn*, supra; *Tiller v. Atlantic Coast Line R. Co.*, supra; *Bailey v. Central Vermont R. Co.*, supra; *Tennant v. Peoria & P.U.R. Co.*, supra.

The *Rogers* case made no such distinction. The following language from the *Rogers* case indicates that the Utah court is again mistaken.

> "The Congress when adopting the law was particularly concerned that the issues *whether there was employer fault* and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence." (Italics ours.)

A BRIEF HISTORY OF THE FEDERAL EMPLOYERS' LIABILITY ACT IN UTAH

Over the years the Utah Supreme Court has authored a number of decisions under the Federal Employers' Liability Act which are at odds with controlling authorities of the United States Supreme Court. The decision here is painfully reminiscent of the past

and would seem to indicate the need for reaffirmance of well-established doctrine in this important class of cases.

In *Pauly v. McCarthy*, supra (1946), plaintiff had received a verdict under the Federal Employers' Liability Act for injuries sustained when he fell while alighting from a caboose at night. Defendant appealed. The Utah court reversed, holding as a matter of law that there was insufficient evidence for the jury. The Utah court held that an unlighted and unguarded walkway along a bridge on the passing track at Chacra, Colorado, was not a place to work, and that defendant had no duty to make it reasonably safe. It stated:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work."

Just as in the case at bar, plaintiff had cited *Bailey v. Central Vermont R. Co.*, supra, as controlling authority. The Utah court attempted to distinguish the *Bailey* case by pointing out that the car involved in the *Bailey* case had been "spotted" on the bridge, and that the bridge was a "definite and assigned place to work." The Supreme Court of the United States reversed in a per curiam opinion, citing *Bailey v. Central Vermont R. Co.*, supra, and *Ellis v. Union Pacific R. Co.*, supra.

In *Wilkerson v. McCarthy*, supra (1947), plaintiff had brought an action under the Federal Employers' Liability Act for personal injuries sustained when he fell from a board across a wheel pit. He was an engine foreman and was moving from one place in the yard to another in the performance of his duties. The Utah court sustained dismissal of the case, holding that the board

across the pit was a place to work for the pit workers but not for other workers. This court unanimously reversed, remanded the case for a new trial, and pointed out that the basic error of the Utah court was its inappropriate resolution of disputed questions of fact. This court stated:

> "Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.
>
> *"It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict."* (Italics ours.)

The strange claim of the Utah Supreme Court that the *Rogers* case requires one quantum of proof for negligence and another for proximate cause is reminiscent of the case of *Coray v. Southern Pacific Co.*, supra (1949), where the Utah court affirmed the trial court in granting a motion for nonsuit in a Federal Employers' Liability Act death case. Certiorari was granted by the United States Supreme Court and the case reversed.

In the *Coray* case a train had stopped suddenly as a result of defective brakes. Very shortly thereafter a track car had run into the rear of the train, causing the death of decedent. The Utah court held that the stopping of the train may have been a cause "in a philosophical sense" but not "in a legal sense."

The Supreme Court of the United States discussed niceties of language to defeat the right of trial by jury:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose."

POINT II

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER'S NEGLIGENCE WITH RESPECT TO HIS CLOTHING AND/OR IN CARING FOR HIS OWN PERSON IN THE COLD WAS THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

The Federal Employers' Liability Act is a comparative negligence statute. Contributory negligence is not a bar to recovery. See 45 U.S.C.A., Sec. 54. In the case at bar the jury expressly held that petitioner was fifty per cent to blame and reduced the verdict by $10,000.00. The Supreme Court of Utah was not content with the jury's verdict but held that petitioner was *solely* to blame for his misfortune. The court stated: (p. 7)

> ". . . it seems quite inescapable that it was the plaintiff's own conduct . . . that resulted in this regrettable injury."[1]

Thus it can be seen that the Utah court defeated peti-

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1. The Utah Supreme Court, in its original opinion, referred to plaintiff's "own neglect, or error of judgment" as the cause of his injury. In the corrected opinion the language was changed to plaintiff's "own conduct."

tioner by labeling as sole proximate cause an act which could at most have only been a contributing factor in bringing about petitioner's injury.

This court has denounced the device adopted by the Utah court in *Grand Trunk Western R. Co. v. Lindsay*, 233 U.S. 42, 34 S.Ct. 581, 58 L.Ed. 838 (1914), in the following language:

> "... and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

See also to the same effect *Tiller v. Atlantic Coast Line R. Co.*, supra; *Illinois Central R. Co. v. Skaggs*, 240 U.S. 66, 36 S.Ct. 249, 60 L.Ed. 528 (1916); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751 (1918); *Spokane & Inland Empire R. Co. v. Campbell*, 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916).

In determining as a matter of law that petitioner's conduct was the sole proximate cause of his injury, the Utah court entirely overlooked certain significant facts.

The foreman and petitioner were together in nighttime, windy zero weather for twelve hours. They were in a precisely equal position to observe conditions and to appreciate the danger from overexposure. The Utah court imposed sole responsibility on petitioner for not observing these conditions, leaving the work to his fellow crew members, and seeking out a comfortable and safe refuge. At the same time, the Utah court held

as a matter of law that the foreman in charge had no responsibility of observing conditions or taking measures for the safety of his men. No consideration was given to the fact that the foreman had absolute and unquestioned authority over his men and responsibility for their safety. By his own testimony the foreman observed that petitioner was not warmly enough dressed when the crew first met at Green River. (R. 101.) Nevertheless he took petitioner to an isolated section sixteen miles from home and worked him in zero temperature for a total of twelve hours without so much as a coffee break. He even selected him to go through the snow for three hundred yards to get the truck, knowing that petitioner was the only member of the crew who wasn't wearing overshoes. (R. 101.) *If this weren't enough, he kept petitioner working in the cold an additional three and one-half hours after being advised that petitioner's fingers were frozen to the wrench and thus having specific knowledge that petitioner was in the very process of being injured from overexposure.* Only if logic is subtracted from the reasoning process can a conclusion be arrived at that petitioner was negligent but that the foreman was free from blame. The complicated reasoning necessary to distinguish and give separate labels to the conduct of petitioner and that of the foreman runs counter to judicial history. This is not even the type of "close or doubtful" case mentioned in the *Bailey* case, supra.

POINT III

THE SUPREME COURT OF UTAH IMPROPERLY RESURRECTED THE DOC-

TRINE OF ASSUMPTION OF RISK AS A BAR TO PETITIONER'S RIGHT OF RECOVERY.

In 1939 Congress amended the Federal Employers' Liability Act by eliminating assumption of risk as a defense. See 45 U.S.C.A., Sec. 54. See Appendix A. The leading case interpreting the aforesaid amendment is *Tiller v. Atlantic Coast Line R. Co.*, supra. In the *Tiller* case this court stated:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' "

And again:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudesence under any other label in the common law lexicon."

We find in the case at bar another attempt to resurrect the doctrine of assumed risk by giving it a different label. The Utah court states: (p. 6, 7)

> "Neither party can be blamed for the cold weather. Both were fully aware of it . . . The plaintiff himself was in the best position to know about the sufficiency of his clothing . . . plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others . . . it seems quite inescapable

> that it was the plaintiff's own conduct with respect to his clothing and/or in caring for his own person in the cold, that resulted in this regrettable injury."

As can readily be seen from the foregoing language, the Utah court is saying, in effect, that the railroad can't be blamed for cold weather, and that consequently any risk of injury from overexposure is assumed by petitioner. Likewise, the railroad can't be blamed for the manner in which petitioner dresses and any risk of injury from inadequate attire is assumed by petitioner. Thus the duty of the railroad to exercise ordinary care in supervision of its employees and in protecting them against unreasonable risk of harm is negated. The workman is given full and exclusive responsibility to look out for himself and, we assume, resign from his employment if necessary[1] in order to protect himself from exposure to the risk of harm.

In *Gulf, Colorado & S.F.R. Co. v. Waterhouse*, Tex. Civ. App., 223 S.W.2d 654 (1949), the appellate court sustained a finding that a foreman was negligent in ordering plaintiff to work after plaintiff complained to him of the effects of heat. Defendant had argued that the foreman was not negligent, *because plaintiff was himself the best judge of his own strength, and that it could be assumed that plaintiff would avoid becoming overheated.* The court stated at page 661:

> ". . . but they bring to mind applications of the defense of assumed risk and suggest further that plaintiff's return to work and his performing work amounted to negligence on his own part and that this negligence was the sole cause of his

1. The Utah court stated at 372 P.2d, p. 6, "If nothing else, the plaintiff could have 'stood in bed.' "

injury. The Federal Employer's Liability Act applies to this case, as plaintiff has pointed out, and thus the defense of assumed risk, including the extensions of this defense referred to in Tiller v. Atlantic Coast Line R. Co., is not available to defendant."

Of particular application to this issue is the language of *Williams v. Atlantic Coast Line R. Co.*, supra, where the court stated:

> "Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this act assume the risks of such danger."

CONCLUSION

The special and important reasons for granting certiorari in this class of cases have been recognized in the case at bar. Petitioner has been granted the right to determination of his case on the merits. It is respectfully submitted that the proofs justify with reason the conclusion that employer negligence played a part in producing his injury. The decision of the Utah Supreme Court should be reversed and the verdict reinstated.

Respectfully submitted.

CALVIN W. RAWLINGS
HAROLD E. WALLACE
BRIGHAM E. ROBERTS
WAYNE L. BLACK
JOHN L. BLACK
RICHARD C. DIBBLEE

Counsel for Petitioner

APPENDIX A

PERTINENT PARTS OF FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C.A., Sec. 51:

LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties

as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

45 U.S.C.A., Sec. 53:

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C.A., Sec. 54:

ASSUMPTION OF RISKS OF EMPLOYMENT

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.